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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 23

Dylan Devore,

Plaintiff and Appellant

v.

American Eagle Energy Corporation,
Integrated Petroleum Technologies, Inc.,
and Brian Barony,

Defendants and Appellees

No. 20190117

Appeal from the District Court of Divide County, Northwest Judicial District,
the Honorable Joshua B. Rustad, Judge.

AFFIRMED.

Opinion of the Court by Tufte, Justice.

Douglas A. Allison (argued), Corpus Christi, Texas, and Jeffrey S. Weikum
(appeared), Bismarck, North Dakota, for plaintiff and appellant.

Kent A. Reiersen (argued) and Lisa M. Six (on brief), Williston, North Dakota,
for defendant and appellee American Eagle Energy Corporation.

Kathleen Pritchard (argued) and Shannon W. Stevenson (appeared), Denver,
Colorado, and Harry M. Pippin (appeared), Williston, North Dakota, for
defendants and appellees Integrated Petroleum Technologies, Inc., and Brian
Barony.

Devore v. American Eagle Energy Corporation
No. 20190117

Tufte, Justice.

[¶1] Dylan Devore appeals from summary judgments dismissing his negligence and gross negligence claims against defendants American Eagle Energy Corporation, Integrated Petroleum Technologies, Inc. (“IPT”), and Brian Barony. We conclude the facts, viewed in a light most favorable to Devore, do not support a conclusion that American Eagle, IPT, or Barony owed Devore a duty of care or proximately caused his injuries. We affirm the summary judgments.

I

[¶2] Dylan Devore was a crew supervisor for Fort Berthold Services (“FBS”), which provided water transfer services for hydraulic fracturing operations at oil wells. In February 2014, American Eagle Energy Corporation began hydraulic fracturing operations on an oil well in Divide County and contracted with FBS to provide water.

[¶3] American Eagle also contracted with IPT, a consulting company. Brian Barony was an employee of IPT. American Eagle had no employees present at the well site in late February or early March 2014. During that time, IPT gave American Eagle updates on the progress of the hydraulic fracturing operation and coordinated the efforts of American Eagle’s various independent contractors. Though IPT coordinated American Eagle’s independent contractors, American Eagle authorized any contractor to stop work at any time if a work condition was unsafe.

[¶4] IPT had no contractual relationship with FBS. FBS took direction from IPT, but FBS controlled its own day-to-day activities, including how it performed its work.

[¶5] FBS used “lay flat” hoses to pump water from a pond near the well site into tanks. It then hauled the water by truck to the well site. On the morning of March 2, 2014, ice had formed in a hose between the pond and tank, which

prevented the flow of water. The FBS crew employed a technique called “pigging” to clear the ice blockage. To pig the hose, the crew placed a football-shaped foam object called a “pig” in the hose and forced it through with compressed air.

[¶6] While the hose was still pressurized from the compressed air, at least one FBS crew member struck it with a sledgehammer in an attempt to dislodge the ice obstruction. The sledgehammer blows caused the hose to break apart and uncontrollably jump and whip around. The flailing hose struck and injured Devore.

[¶7] About one week before this incident, Barony had worked with FBS and Devore on an unrelated job. There, Barony witnessed Devore and his crew pig a hose and strike it with sledgehammers, which caused the hose to flail around violently. Barony concluded this process was unsafe, and prior to March 1, 2014, told Devore and FBS they were not authorized to use the process for clearing ice obstructions on the American Eagle job. Devore testified in his deposition that prior to the March 2, 2014, incident, Barony “implied the urgency behind the situation on how fast he wanted things done” and told Devore to pig the hose. In his deposition, Barony denied ever telling Devore and FBS to pig the hose. There was no testimony that Devore received any express instruction to pig the line.

[¶8] Devore sued American Eagle, IPT, and Barony for negligence and gross negligence. American Eagle moved for summary judgment, arguing it did not retain control over its independent contractor, FBS, or proximately cause Devore’s injuries. IPT and Barony also moved for summary judgment, arguing Devore failed to raise a genuine issue of fact that IPT or Barony owed him a duty of care or that IPT or Barony proximately caused Devore’s injuries. The district court held a consolidated hearing for both motions, and granted summary judgment for all defendants.

II

[¶9] Devore argues the district court erred in granting summary judgment for American Eagle.

[¶10] Our standard of review for summary judgments is well established:

Summary judgment is a procedural device under N.D.R.Civ.P. 56(c) for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party seeking summary judgment must demonstrate there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, we view the evidence in the light most favorable to the opposing party, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact. When reasonable persons can reach only one conclusion from the evidence, a question of fact may become a matter of law for the court to decide. A district court's decision on summary judgment is a question of law that we review de novo on the record.

Brock v. Price, 2019 ND 240, ¶ 10, 934 N.W.2d 5 (quoting *Smithberg v. Smithberg*, 2019 ND 195, ¶ 6, 931 N.W.2d 211).

[¶11] The district court found no genuine issues of material fact existed regarding whether American Eagle owed a duty to Devore or whether American Eagle was the proximate cause of Devore's injuries.

A

[¶12] Devore argues the district court erred in granting summary judgment, because a genuine issue of material fact existed as to whether American Eagle retained sufficient control over its independent contractor, Devore, to owe him a duty of care.

[¶13] “Under North Dakota law, an employer of an independent contractor generally is not liable for the acts or omissions of the independent contractor.” *Grewal v. N.D. Ass’n of Counties*, 2003 ND 156, ¶ 10, 670 N.W.2d 336. However, Restatement (Second) of Torts § 414 (1965) provides an employer may be liable for an independent contractor’s work if the employer retains control over the independent contractor:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

[¶14] In *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 448 (N.D. 1994), we explained the degree of retained control necessary to impose a duty on an employer of an independent contractor:

The liability created by Section 414 arises only when the employer retains the right to control the method, manner, and operative detail of the work; it is not enough that the employer merely retains the right to inspect the work or to make suggestions which need not be followed. Comment c to Section 414 explains the difference:

“In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.”

[¶15] Undisputed evidence showed Devore was an employee of FBS, FBS was an independent contractor of American Eagle, and FBS had exclusive control over the method, manner, and operative detail of its work. Because American Eagle did not retain control over its independent contractor FBS's work, it is not liable as a matter of law for FBS's negligence. Viewing this evidence in the light most favorable to Devore, we conclude the district court properly found there was no genuine issue of material fact regarding American Eagle's duty to Devore under the retained control doctrine.

B

[¶16] Devore also argues the district court erred in granting summary judgment for American Eagle, because a genuine issue of material fact existed as to whether American Eagle proximately caused Devore's injuries. We need not address the parties' arguments concerning proximate cause because American Eagle did not owe Devore a duty of care.

III

[¶17] Devore argues the district court erred in granting summary judgment for IPT and Barony. The district court granted summary judgment for IPT and Barony, concluding they did not owe Devore a duty of care and they did not proximately cause Devore's injuries.

A

[¶18] Devore argues the district court erred in concluding IPT and Barony did not owe him a duty of care. Regarding the existence of a duty, we have said:

An actionable negligence "consists of a duty on the part of an allegedly negligent party to protect the plaintiff from injury, a failure to discharge that duty, and a resulting injury proximately caused by the breach of the duty." *Groleau [v. Bjornson Oil Company]*, 2004 ND 55, ¶ 6, 676 N.W.2d 763]; *Rogstad v. Dakota Gasification Co.*, 2001 ND 54, ¶ 12, 623 N.W.2d 382. To establish an actionable negligence, the plaintiff must show the defendant had a duty to protect the plaintiff from injury. *Groleau*, at ¶ 6; *Rogstad*, at ¶ 12. Generally, the existence of a duty is a preliminary

question of law for the court to decide. *Groleau*, at ¶ 6; *Rogstad*, at ¶ 12. When a duty does not exist, there is no negligence. *Rogstad*, at ¶ 12. If determining the existence of a duty depends on resolving factual issues, the facts must be resolved by the trier of fact. *Groleau*, at ¶ 6. However, “[i]ssues of fact may become issues of law for the court if reasonable persons could reach only one conclusion from the facts”. *Groleau*, at ¶ 6.

Azure v. Belcourt Pub. Sch. Dist., 2004 ND 128, ¶ 9, 681 N.W.2d 816.

[¶19] “Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.” *Id.* at ¶ 10 (citing 57A Am. Jur. 2d *Negligence* § 89 (1989 & Supp. 2002)).

[¶20] Devore argues IPT and Barony owed him a duty as his employer under the retained control doctrine discussed above. It is undisputed that IPT and Barony were not Devore’s employers and IPT had no contractual relationship with FBS. Without an employment or contractual relationship, IPT and Barony can be liable under Section 414 only if they exercised American Eagle’s authority to control FBS and Devore’s work. IPT and Barony had no authority to terminate FBS or Devore on behalf of American Eagle. Devore knew any FBS employee had authority to stop work if anything appeared to be unsafe. The evidence in the record supports an inference that American Eagle wanted FBS and Devore to clear the line so that water could flow in support of well site operations. The evidence does not support a reasonable inference that Barony exercised control over FBS and Devore by a direction to pig the frozen line with a sledge hammer contrary to the agreement put in place a week before. The facts in the record raise no genuine issue of material fact and support no reasonable inference that IPT or Barony exercised retained control over Devore sufficient to support a duty of care. *See Pechtl v. Conoco, Inc.*, 1997 ND 161, ¶ 10, 567 N.W.2d 813.

[¶21] Viewing the evidence in the light most favorable to Devore, we conclude the district court properly found there was no genuine issue of material fact regarding whether IPT or Barony owed Devore a duty.

B

[¶22] Devore also argues the district court erred in finding there was no genuine issue of material fact as to whether IPT and Barony proximately caused Devore's injuries. We need not address the parties' arguments concerning proximate cause because IPT and Barony did not owe Devore a duty of care.

[¶23] We affirm the summary judgment in favor of IPT and Barony.

IV

[¶24] We affirm the judgments.

[¶25] Jerod E. Tufte
Gerald W. VandeWalle
Daniel J. Crothers
Jon J. Jensen, C.J.
Bruce B. Haskell, S.J.

[¶26] The Honorable Bruce B. Haskell, Surrogate Judge, sitting in place of McEvers, J., disqualified.